(2)

Supreme Court, U.S.
FILED
JUL 15 1996
CLERK

No. 95-2005

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

JOSEPH B. VALDER,

Petitioner,

v.

WILLIAM G. MOORE, JR.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

RESPONDENT'S OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

TIMOTHY B. DYK
(Counsel of Record)
JAMES E. ANKLAM
DANIEL H. BROMBERG
JONES, DAY, REAVIS & POGUE
1450 G Street, N.W.
Washington, D.C. 20005
(202) 879-3939

PAUL MICHAEL POHL
JOHN J. MEAD
IRA L. PODHEISER
JONES, DAY, REAVIS & POGUE
One Mellon Bank Center
31st Floor
Pittsburgh, PA 15219
(412) 391-3939

Counsel for Respondent

50 pp

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

STATEMENT 2

REASONS FOR DENYING THE WRIT 9

I. THE COURT OF APPEALS CORRECTLY APPLIED THIS COURT'S DECISION IN *BUCKLEY V. FITZSIMMONS* TO THE FACTS OF THIS CASE 10

II. PETITIONER HAS NOT SHOWN ANY CONFLICT AMONG THE LOWER COURTS OVER THE APPLICATION OF THIS COURT'S DECISION IN *BUCKLEY* 15

III. THE DECISION BELOW DOES NOT PRESENT ANY ISSUE WARRANTING THIS COURT'S REVIEW 17

CONCLUSION 19

TABLE OF AUTHORITIES

Page

Cases

Ex Parte Brandley, 781 S.W.2d 886 (Tex. Crim. App. 1989) 16
Brandley v. Keeshan, 64 F.3d 196 (5th Cir. 1995), *cert. denied*, 116 S. Ct. 947 (1996) 16
Brodnicki v. City of Omaha, 75 F.3d 1261 (8th Cir. 1996) 16
Buckley v. Fitzsimmons, 509 U.S. 259 (1993) . . . . . *passim*
Burns v. Reed, 500 U.S. 478 (1991) 10, 13
Cook v. Houston Post, 616 F.2d 791 (5th Cir. 1980) 15
Demery v. Kupperman, 735 F.2d 1139, 1144 (9th Cir. 1984), *cert. denied*, 469 U.S. 1127 (1985) 15
Harlow v. Fitzgerald, 457 U.S. 800 (1982) 18
Hill v. City of New York, 45 F.3d 653 (2d Cir. 1995) 16, 17
Imbler v. Pachtman, 424 U.S. 409 (1976) 9, 10, 13
Malley v. Briggs, 475 U.S. 335 (1986) 18
Mitchell v. Forsyth, 472 U.S. 511 (1985) 18
Myers v. Morris, 810 F.2d 1437 (8th Cir.), *cert. denied*, 484 U.S. 828 (1987) 15
Pinaua v. County of Suffolk, 52 F.3d 1139 (2d Cir. 1995) 16
Rose v. Bartle, 871 F.2d 331 (3d Cir. 1989) 15, 16
Tower v. Glover, 467 U.S. 914 (1984) 13

Statutes and Rules

Federal Torts Claim Act, 28 U.S.C. §§ 2671-80 7
Fed. R. Crim. P. 6 13
Sup. Ct. R. 10 10

Miscellaneous Authorities

United States Department of Justice, *Legal Activities 1995-96* (1995) 17

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

No. 95-2005

JOSEPH B. VALDER,

Petitioner,

v.

WILLIAM G. MOORE, JR.,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

RESPONDENT'S OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

In the decision below, a unanimous panel of the D.C. Circuit held, *inter alia*, that prosecutors are not absolutely immune from suit for coercing witnesses into testifying falsely or for disclosing grand jury testimony to unauthorized individuals. This decision does not make new law. It simply applies this Court's decision in *Buckley v. Fitzsimmons*, 509 U.S. 259 (1993), to the facts of this case. Since the decision below is also consistent with the only other appellate decision applying *Buckley* to analogous facts, this

case does not warrant this Court's review. The petition should therefore be denied.

STATEMENT

Because the petition addresses the question of official immunity, a threshold issue normally decided on the basis of the pleadings, the facts asserted by respondent must be taken as true. *See Buckley*, 509 U.S. at 261. Those facts are as follows:

The Conspiracy Prosecution — Respondent William G. Moore, Jr. is a former Chief Executive Officer of Recognition Equipment Incorporated ("REI"). (Pet. 56a). Prior to Moore's arrival in 1982, REI was struggling. Within a year, under Moore's direction, the company prospered. By 1986, REI had reached $241.8 million in revenues and was widely considered one of the most dynamic and successful publicly-held corporations in the Dallas area. As a result of this success, Moore was named Dallas Business Man of the Year. Moore also served on Georgetown University's Board of Regents, on the President's Advisory Committee for Trade Negotiations, and on the boards of several charitable organizations. (*Id.*; Resp. App. 16a).

In the mid-1980s, REI developed a multi-line optical character reading machine. The company believed that this machine could materially speed up the processing of mail, thereby saving the United States Postal Service (USPS) millions of dollars per year. (Pet. 56a, 76a). The postal service, however, chose to employ a single-line technology, which, unlike REI's multi-line technology, was dependent upon public use of nine-digit zip codes. This decision, ultimately reversed, became the center of a divisive public debate involving congressional inquiries and broad media exposure. (*Id.* at 56a-57a, 76a). At the center of this controversy was Moore, who sharply criticized USPS procurement practices both publicly and to members of Congress. (*Id.* at 57a). Not surprisingly, these criticisms made Moore many enemies at the postal service. (*Id.* at 17a, 66a).

In the course of his campaign to convince the postal service to use multi-line readers, Moore and REI engaged, at the

suggestion of a member of the Board of Governors of the USPS, the services of a public relations and consulting firm. (Pet. 57a, 75a-76a). Unbeknownst to Moore and REI, the firm was engaged in a kickback scheme in which the firm paid a member of the USPS board for referring clients to the firm and for providing contracts to the firm's clients. (*Id.* at 74a-75a). All the participants denied that Moore knew of the scheme, and none of the thousands of documents reviewed during the postal service's investigation suggested otherwise. (*Id.* at 58a, 87a). Nevertheless, on October 6, 1988, Moore, another REI official, and REI itself were indicted for participating in the kickback scheme as well as for conspiring to influence the selection of a Postmaster General who favored multi-line readers. (*Id.* at 55a, 70a-74a, 88a-89a).

At trial, the government presented its case for more than five weeks. When the government rested, Moore and the other defendants moved for a judgment of acquittal. In granting the motion (Pet. 69a-100a), Judge Revercomb took the unusual step of reading his lengthy decision in open court. In his view, the government not only failed to make out a prima facie case of conspiracy; in many instances, the evidence presented was "exculpatory and point[ed] toward the innocent conduct of the Defendants." (*Id.* at 70a-71a).

Despite his acquittal, Moore suffered grievous injury from the government's investigation, the indictment, and trial. As a result of the indictment, REI was debarred from government contracting, which sent the company's stock plummeting. This decline caused Moore, who owned more than 100,000 shares in the company and had options for still more, "catastrophic financial injury." (Pet. 55a, 62a, 66a). The indictment also damaged Moore's reputation, forcing him to resign from the boards on which he served and preventing him from finding comparable employment for many years after a hostile takeover at REI. (*Id.* at 62a, 66a). The investigation, indictment, and trial also exacted a physical and emotional toll on Moore, who at one point suffered what doctors in the Parklane Hospital emergency room diagnosed as acute stress reaction. (*Id.* at 66a-67a).

The OPR Investigation — At trial, Moore moved to dismiss the indictment on grounds of prosecutorial misconduct. Because the government presented insufficient evidence at trial, the district court did not reach the motion. (Pet. 100a). Accordingly, after trial, counsel for the defense (Robert Bennett, Jack Cooney, Marshall Searcy, and Charles Stillman — all former Assistant United States Attorneys) asked the Department of Justice's Office of Professional Responsibility (OPR) to investigate the behavior of the prosecutor, petitioner Joseph A. Valder. (Resp. App. 3a-5a). OPR acknowledged that Valder had prevented witnesses from telling the grand jury that Moore was unaware of the kickback scheme, and that Valder had asked these witnesses leading questions to "which he should have known rested upon a faulty premise." (*Id.* at 6a-7a, 8a-9a). OPR conceded as well that Valder had threatened one witness by tearing up his non-prosecution letter, withheld a transcript from a polygraph examination in which the same witness repeatedly denied any knowledge that Moore was aware of the kickback scheme, and disclosed grand jury testimony to unauthorized persons. (*Id.* at 7a-11a). Nevertheless, OPR refused to recommend any disciplinary action. (*Id.* at 12a-15a).[1]

The Claims Below — Approximately four months after OPR closed its investigation, Moore sued Valder and six postal inspectors. The complaint (Pet. 53a-68a) alleged that the defendants violated his constitutional rights by, among other things, retaliating against him for his criticisms of the postal service. Indeed, Valder and the postal inspectors decided to "get" Moore even though every admitted participant in the kickback scheme had told them that Moore was not aware of the scheme

---

[1] This refusal is particularly troubling in light of Valder's admitted disinterest in Moore's guilt or innocence. According to the uncontroverted affidavit of a grand jury witness (Resp. App. 17a-20a), Valder stated that "whether the persons involved [in this case] were guilty or not did not concern him." Moore's prosecution was only important to Valder "to get a track record or some notoriety which would help him obtain a good position in private practice." (*Id.* at 19a).

and that the participants had, in fact, attempted to conceal the conspiracy from him. (*Id.* at 58a). In so doing, Valder engaged in a shocking array of prosecutorial misconduct.

In order to obtain Moore's indictment, Valder deliberately concealed from the grand jury the fact that Moore was unaware of the kickback scheme. (Pet. 58a-62a). Rather than permitting witnesses who had informed Valder that Moore had no knowledge of the scheme to testify freely, Valder and the postal inspectors prepared statements summarizing their testimony, which were for the most part presented to the grand jury in lieu of live testimony. (*Id.* at 59a-60a). In this fashion, Valder was able to create the false impression that Moore must have known about the conspiracy through the very witnesses who were prepared to testify that Moore had no knowledge of the kickback scheme and that they had in fact disguised the scheme from him.

In addition to suppressing evidence of Moore's innocence, Valder also fabricated evidence of Moore's guilt. William Spartin was the president of the consulting firm at the center of the kickback scheme. Granted immunity in exchange for his testimony, Spartin was to have been the government's star witness against Moore. (Pet. 57a-58a). Spartin, however, told Valder and the postal inspectors that neither he nor anyone else had informed Moore of the kickback scheme. (*Id.* at 61a). In fact, in a polygraph examination conducted nearly two years before Moore's indictment -- despite repeated attempts by the examiner to trick him into incriminating Moore -- Spartin stated no less than nineteen times that Moore and his co-defendants were not, to his knowledge, aware of the kickbacks. (Resp. App. 22a-27a). Moreover, these denials occurred in spite of repeated attempts to "spin" Spartin into incriminating Moore.

At one point, Valder and the postal inspectors staged a pre-planned outburst designed to intimidate Spartin, who had a heart condition and was undergoing psychiatric treatment. During an interrogation of Spartin, while postal inspectors surrounded Spartin, Valder accused him of hiding Moore's involvement and then, for dramatic effect, tore up Spartin's immunity letter. (*Id.*).

At another point, Valder issued a subpoena for Spartin's son and threatened to prosecute the son for obstruction of justice. (*Id.*).[2] In addition, in clear violation of the Federal Rules of Criminal Procedure, Valder disclosed to Spartin testimony given before the grand jury by other witnesses, testimony that, as mentioned above, had been carefully drafted by Valder and the postal inspectors to give the impression that Moore had knowledge of the kickback scheme. (*Id.* at 61a).[3]

In addition to attempting to intimidate Spartin into incriminating Moore, Valder also attempted to coerce Frank Bray, a former REI executive, into giving false testimony. Bray, like Spartin, had told Valder that Moore was not aware of the kickback scheme. Nevertheless, in July 1987, more than a year before Moore was indicted, petitioner asked Bray to sign a witness statement indicating that Moore knew of the kickback scheme. (Pet. 60a). Valder then informed Bray that if he did not accept the statement as drafted, he would have to testify before the grand jury for five to seven days or "however long it took." (Resp. App. 21a). Nevertheless, Bray and his attorney Ellen Huvelle (now a Judge of the Superior Court of the District of Columbia) insisted that a paragraph be added reflecting that Moore had no knowledge of the kickback scheme. Valder refused to permit the paragraph, but promised that if Bray signed the proposed statement, he would be permitted to testify orally that Moore had no knowledge of the kickback scheme. (Pet. 60a).

---

[2] The threats against Spartin's son are vividly described in the transcript of Spartin's polygraph examination. (Resp. App. 22a-27a).

[3] Petitioner also disclosed grand jury testimony (and a draft indictment) to former Postmaster General Paul Carlin in an apparent attempt to influence a multi-million dollar private civil lawsuit Carlin had filed against Moore. (Pet. 61a).

When, however, Bray came before the grand jury, Valder reneged on his promise. (*Id.*).[4]

The Decision Below — Moore initially brought his claims against petitioner and various postal inspectors in the United States District Court for the Northern District of Texas. (Pet. 53a-68a). Once administrative procedures were exhausted, Moore brought claims against the United States under the Federal Torts Claim Act, 28 U.S.C. §§ 2671-80, in the same venue. The district court in Texas dismissed many of these claims, including all those against Valder, and transferred the rest to the District Court for the District of Columbia. (*Id.* at 41a-52a). Following transfer, the cases were consolidated, and the remaining defendants renewed their motion to dismiss. In a decision dated September 24, 1993, the District of Columbia court granted the motion. (*Id.* at 23a-40a).

On September 22, 1995, a unanimous panel of the D.C. Circuit (Edwards, C.J., Wald and Henderson, JJ.) affirmed in part and reversed in part the decisions below. In an opinion by Judge Henderson, the panel recognized that a prosecutor "enjoys absolute immunity . . . when he acts 'as an advocate' by engaging in activities 'intimately associated with the judicial phase of the criminal process.'" (Pet. 10a (quotation omitted)). Focusing on this Court's decision in *Buckley v. Fitzsimmons*, the panel recognized that a prosecutor's "advocatory" conduct "'include[s] the professional evaluation of the evidence assembled by the police and appropriate preparation for its presentation at trial or before a grand jury.'" *(Id.* at 11a-12a (quoting *Buckley*, 509 U.S. at 273)). At the same time, however, the panel observed that "when a prosecutor 'performs the investigative functions normally

---

[4] At trial, Valder continued to suppress exculpatory evidence. Although Judge Revercomb ordered Valder to turn over even "borderline" *Brady* material, Valder nonetheless refused to produce either the polygraph examination (in which Spartin stated nineteen times that, to his knowledge, Moore was not aware of the kickback scheme) or Bray's amended witness statement. (Pet. 61a-62a).

performed by a detective or police officer,' he is entitled only to the qualified immunity that the detective or police officer enjoys." (*Id.* at 12a (quoting *Buckley*, 509 U.S. at 273)).

Applying *Buckley* and this Court's other decisions on prosecutorial immunity, the panel found that Valder's "unquestionably advocatory decision to prosecute Moore," as well as his decision to conceal exculpatory evidence from the grand jury, were protected by absolute immunity. (Pet. at 10a-12a). The panel refused, however, to find that Valder's attempts to coerce witnesses into giving false testimony or his unauthorized disclosure of grand jury testimony were absolutely immune from suit because, in the panel's view, Valder was not performing an advocatory function when he engaged in that conduct. (*Id.* at 13a-14a).

As the panel recognized, in attempting to coerce witnesses into incriminating Moore, Valder was exploring "whether the government ha[d] acquired all incriminating evidence" against Moore. (Pet. 13a). In the panel's view, conduct of this sort is investigatory in nature because it relates to "a typical police function, the collection of information." (*Id.* (citation omitted)). Accordingly, the panel held that "[i]ntimidating and coercing witnesses into changing their testimony is not advocatory" and therefore not protected by absolute immunity. (*Id.*). Any other result, the panel observed, would be anomalous: when, as here, a prosecutor performs investigative functions normally performed by a police officer, "'it is neither appropriate nor justifiable that, for the same act, immunity should protect one and not the other.'" (*Id.* at 14a (quoting *Buckley*, 509 U.S. at 273)).

The panel also found that disclosing grand jury testimony to unauthorized third parties is not advocatory. In *Buckley*, this Court held that a prosecutor is not absolutely immune for making allegedly false statements to the press because "'statements to the media have no functional tie to the judicial process.'" (Pet. 12a (quoting *Buckley*, 509 U.S. at 277)). Finding that the unauthorized disclosure of grand jury testimony also "has no functional tie to the judicial process," the panel concluded that the

unauthorized disclosure of grand jury testimony is likewise not absolutely immune from suit. (*Id.* at 14a).

Although the panel found that Valder's attempts to coerce witnesses into giving false testimony and his unauthorized disclosure of grand jury testimony were not protected by absolute immunity, it nonetheless held that such conduct was entitled to qualified immunity. (Pet. 14a). The panel found, however, that qualified immunity would not bar Moore's claim that he was prosecuted in retaliation for his criticisms of the USPS because the right to be free from retaliatory prosecution was clearly established at the time of the conduct alleged in the complaint. (*Id.* at 16a). The panel also found any heightened pleading standard satisfied because there was evidence in the record that Moore's criticisms "produced hostility in USPS management" and that the defendants shared this hostility. (*Id.* at 17a). Accordingly, the court remanded this case to the district court. (*Id.* at 19a-20a).

The Petition for Rehearing — In response to the panel's decision, the Department of Justice filed on Valder's behalf a petition for panel rehearing with a suggestion of rehearing en banc seeking reconsideration of the absolute immunity issue. (Valder has not challenged the panel's qualified immunity ruling in either the petition for rehearing or here.) The D.C. Circuit denied rehearing without a single dissent. (Resp. App. 1a-2a). The Solicitor General subsequently declined Valder's request to petition this Court for certiorari. *See* Petitioner's Application for Further Extension of Time, Application No. A-844, May 9, 1996, at 2.

REASONS FOR DENYING THE WRIT

This case does not merit review by this Court. While this Court has long recognized that prosecutors are absolutely immune from claims based upon conduct that is "intimately associated with the judicial phase of the criminal process," *Imbler v. Pachtman*, 424 U.S. 409, 430 (1976), it has also held that prosecutors, like police officers, are protected by only qualified immunity when engaged in conduct that is investigatory in nature.

See, e.g., *Buckley*, 509 U.S. at 271-78; *Burns v. Reed*, 500 U.S. 478, 492-96 (1991), *Imbler*, 424 U.S. at 430-31.

In the decision below, a unanimous panel of the D.C. Circuit applied this distinction between advocatory and investigatory conduct. The panel concluded that the witness interrogations in this case, some conducted years before respondent's indictment and arrest, were investigatory rather than advocatory in nature because their goal was to collect (or, more precisely, fabricate) evidence of respondent's guilt. The panel also found that the unauthorized disclosure of grand jury materials has no functional tie to the judicial process and is therefore not advocatory. These rulings do not make new law: they simply apply the distinction between investigatory and advocatory conduct — and, in particular, this Court's interpretation of that distinction in *Buckley v. Fitzsimmons* — to the facts of this case. Nor do the rulings below create any conflict among the circuits. To the contrary, the decision below is consistent with the only other appellate decision to apply *Buckley* to analogous facts. As a consequence, there is no "compelling reason[]" (Sup. Ct. R. 10) for this Court to review the narrow, fact-bound decision below. The petition should therefore be denied.

I. THE COURT OF APPEALS CORRECTLY APPLIED THIS COURT'S DECISION IN *BUCKLEY v. FITZSIMMONS* TO THE FACTS OF THIS CASE.

1. Both of the rulings Valder challenges — that coercing witnesses into giving false testimony and disclosing grand jury testimony without a court order are not absolutely immune from suit — flow directly from this Court's decision in *Buckley v. Fitzsimmons*.

The claims in *Buckley* arose out of a highly publicized murder investigation. The primary evidence of the murderer's identity was a bootprint found on the victim's door. Working hand in hand with sheriff's detectives, the prosecutor presented the bootprint to three government experts, none of whom could make a reliable connection between the print and the boots the plaintiff had voluntarily supplied. *See* 509 U.S. at 262, 272. The

prosecutor then approached an anthropologist "allegedly well known for her willingness to fabricate unreliable expert testimony," who opined that plaintiff's boots made the prints on the victim's door. *Id.* at 262. Months later, a grand jury was convened to investigate the murder, and, ten months after that, the plaintiff was indicted and arrested. *See id.* at 275.

After the jury refused to convict, the plaintiff sued, alleging that the prosecutor had violated his constitutional rights. While recognizing that a prosecutor's efforts to "control the presentation of a witness' testimony" are advocatory in nature, the Court nonetheless held that the defendant's "preindictment fabrication of evidence" was not protected by absolute immunity. *Buckley*, 509 U.S. at 272. Indeed, in the Court's view, the question was an easy one. Because the prosecutor did not have probable cause to arrest the plaintiff when he sought the anthropologist's expert testimony, the prosecutor's conduct was "entirely investigative" in character. *Id.* at 274. "A prosecutor," this Court reasoned, "neither is, nor should consider himself to be, an advocate before he has probable cause to have anyone arrested." *Id.* (footnote omitted); *but see id.* at 274 n.5 (noting that "a determination of probable cause does not guarantee a prosecutor absolute immunity from liability for all actions taken afterwards").

The D.C. Circuit's holding that petitioner's interrogation of Spartin and Bray was investigatory flows directly from *Buckley*. The relevant facts in the two cases are quite similar. Like the prosecutor in *Buckley*, Valder worked hand in hand with investigators to uncover new evidence, and, like the "preindictment fabrication of expert testimony" of the prosecutor in *Buckley*, Valder's attempt to coerce false testimony from Spartin and Bray occurred prior to indictment. Indeed, Valder's interrogations of Spartin took place nearly two years before Moore's indictment. Moreover, no meaningful distinction can be made between the prosecutor's attempt to fabricate expert testimony in *Buckley* and petitioner's attempt here to coerce and intimidate witnesses into changing and falsifying their testimony. Thus, as the D.C. Circuit recognized, if the prosecutor in *Buckley* was engaged in investigatory conduct when he shopped for expert

testimony incriminating the plaintiff in *Buckley*, Valder must likewise have been engaged in "a typical police function, the collection of information to be used in a prosecution," when he attempted to manipulate and coerce Spartin and Bray into incriminating respondent. (Pet. 13a (citation omitted)).

Despite Valder's attempts to characterize it as such, this case does not present a situation in which law enforcement agents investigated a matter and brought it to a prosecutor to present to the grand jury. Valder did not merely explore with the witnesses how he would present their testimony to the grand jury. Working with postal inspectors, petitioner attempted to collect new evidence by intimidating and coercing witnesses into implicating respondent. Plainly, such behavior is more than mere preparation of testimony; it falls squarely within the category of investigative conduct, just as the fabrication of expert testimony did in the *Buckley* case.

The other holding in the decision below — that Valder's unauthorized disclosure of grand jury testimony was not advocatory — also flows directly from *Buckley*. *Buckley* found that comments made by a prosecutor at a press conference are not advocatory. *See* 509 U.S. at 276-78. Conducting a press conference, this Court reasoned, is not intimately related to the judicial process: "[t]he conduct of a press conference does not involve the initiation of a prosecution, the presentation of the state's case in court, or actions preparatory for these functions." *Id.* at 278. The D.C. Circuit observed that disclosing grand jury testimony to unauthorized third parties likewise does not involve the initiation of prosecution, the presentation of evidence, or actions preparatory to those functions. The court therefore concluded that under *Buckley* the disclosure of grand jury testimony is not advocatory because, like a press conference, such a disclosure "has no functional tie to the judicial process." (Pet. 14a).

Finally, even if the facts of this case could be distinguished from those in *Buckley*, the decision below would still be compelled by the principles this Court recognized in *Buckley* and

other decisions. This Court has been "quite sparing" in its recognition of absolute immunity: "[t]he presumption is that qualified rather than absolute immunity is sufficient to protect government officials in the exercise of their duties." *Burns v. Reed*, 500 U.S. at 486-87. Accordingly, a prosecutor seeking to invoke absolute immunity must show that "the conduct for which he seeks immunity would have been privileged at common law in 1871." *Buckley*, 509 U.S. at 281 (Scalia, J., concurring); *accord Tower v. Glover*, 467 U.S. 914, 920-23 (1984); *Imbler*, 424 U.S. at 427. Petitioner does not even begin to satisfy this burden. Moreover, as this Court has observed, there is "no common-law tradition of immunity for [fabrication of evidence], whether performed by a police officer or prosecutor." *Buckley*, 509 U.S. at 274 n.5.

2. Valder offers a number of criticisms of the decision below. None have merit.

a. Valder attempts (Pet. 13-14 n.8) to distinguish *Buckley* by pointing out that in *Buckley* evidence was fabricated before the grand jury was empaneled. Nothing, however, in *Buckley* turns upon the largely ministerial function of empaneling a grand jury.[5] *Buckley* focused instead on whether the fabrication of evidence in that case occurred "preindictment" and "before [the prosecutor] had probable cause." 509 U.S. at 273-274. Moreover, this Court expressly rejected the suggestion that use of evidence before a grand jury can "retroactively transform [a prosecutor's misconduct] from the administrative into the prosecutorial." *Id.* at 276 (footnote omitted). Thus, *Buckley* cannot be distinguished on the ground that a grand jury happened to be empaneled in this case.

---

[5] Valder's argument seems to proceed on the assumption that grand juries are specially convened by prosecutors and directed towards a single matter. In fact, grand juries are convened by judges and are normally continue for a specific period of time rather than for a specific case. *See* Fed. R. Crim. P. 6(a) & (g). Moreover, in many districts, the grand jury is always in session.

b. Valder also argues (Pet. 13) that, because "[o]btaining an indictment without probable cause has always been absolutely immunized," the misconduct alleged in this case, which "occurred in the course of obtaining an unjust and otherwise unobtainable indictment," should be absolutely immunized as well. In *Buckley*, the lower court similarly reasoned that prosecutorial misconduct prior to indictment should be absolutely immune if the only injury suffered was from the ensuing judicial proceedings. *See Buckley*, 509 U.S. at 271. This Court expressly rejected that reasoning. In this Court's view, the proper focus is not on the "[l]ocation of the injury" allegedly suffered, *id.* at 271-72, but on the conduct being challenged and, in particular, on whether there was a common-law tradition of absolute immunity for that conduct. *See id.* at 274 n.5. As indicated above, *see supra* pp. 12-13, there is no evidence of such a tradition for the conduct at issue in this case.

c. Valder repeatedly asserts (Pet. 3-4, 14-16, 23) that the decision below focused upon the improper means he employed rather than the functions he performed. This is simply not true. The decision below focused upon the fact that Valder's conduct "relate[d] to a typical police *function*, the collection of information to be used in a prosecution," and "ha[d] no *functional* tie to the judicial process." (*Id.* at 13a-14a (emphasis added)). Nothing in the decision below even remotely suggests that a plaintiff can defeat the bar of absolute immunity by merely alleging the use of improper means. It should come as no surprise then that Valder derives (*id.* at 14) his assertion not from an analysis of the decision below, but from an analysis of the complaint — which, as Valder acknowledges (*id.* at 16), had to allege that Valder employed improper means in order to state a claim.

II. PETITIONER HAS NOT SHOWN ANY CONFLICT AMONG THE LOWER COURTS OVER THE PROPER APPLICATION OF THIS COURT'S DECISION IN *BUCKLEY*.

Petitioner asserts (Pet. 3, 17) that the decision below is "contrary to" and "at odds" with the decisions of other circuits. Most of the decisions he cites were, however, decided before *Buckley* and thus have no continuing relevance.[6] Only three cases

---

[6] In fact, many of the pre-*Buckley* decisions Valder cites conflict with *Buckley*. For example, while *Buckley* held that a prosecutor's investigatory functions are not entitled to absolute immunity, *see* 509 U.S. at 272, one of the decisions cited by Valder states that absolute immunity extends "to a prosecutor's actions in initiating, *investigating* and pursuing a criminal prosecution." *Cook v. Houston Post*, 616 F.2d 791, 793 (5th Cir. 1980) (emphasis added). Other decisions, contrary to *Buckley*'s holding that a prosecutor cannot act as an advocate "before he has probable cause to have anyone arrested" (509 U.S. at 274), hold that any attempt by a prosecutor to "evaluate whether probable cause existed to charge" is advocatory. *Myers v. Morris*, 810 F.2d 1437, 1451 (8th Cir.), *cert. denied*, 484 U.S. 828 (1987); *see also Demery v. Kupperman*, 735 F.2d 1139, 1144 (9th Cir. 1984) (holding that "conferring with potential witnesses for the purpose of determining whether to initiate proceedings" is advocatory), *cert. denied*, 469 U.S. 1127 (1985). Yet another decision cited by Valder holds that "direct solicitations of testimony for use in the grand jury proceedings" is advocatory. *Rose v. Bartle*, 871 F.2d 331, 344 (3d Cir. 1989). In *Buckley*, however, the Court held that the fact that "the prosecutors later called a grand jury to consider the evidence this [investigative] work produced does not retroactively transform that work from the administrative into the prosecutorial." 509 U.S. at 275-76.

In addition, none of the cases cited by Valder consider whether the unauthorized disclosure of grand jury testimony is advocatory in nature. True, Valder does characterize (Pet. 22) the Third Circuit's decision in *Rose* as "holding" such disclosures absolutely immune from suit. In fact, however, the Third Circuit refused to consider the issue because, in its view, there was insufficient evidence before it to "determine what 'role' the defendants were acting in" when they disclosed grand jury

were decided after *Buckley*. Two of those cases bear little factual resemblance to this case. *See Pinaud v. County of Suffolk*, 52 F.3d 1139, 1150-51 (2d Cir. 1996) (considering claim based upon guilty plea); *Brodnicki v. City of Omaha*, 75 F.3d 1261, 1267 (8th Cir. 1996) (considering claim based upon interviews during the pendency of a judicial proceeding). And the third is easily distinguishable.

In the third case, *Brandley v. Keeshan*, 64 F.3d 196 (5th Cir. 1995), *cert. denied*, 116 S. Ct. 947 (1996), the plaintiff alleged that the prosecutor "*probably* directed" a Texas ranger to coerce witnesses into identifying plaintiff as the murderer. 64 F.3d at 201 (emphasis added); *see also Ex Parte Brandley*, 781 S.W.2d 886, 888-90 (Tex. Crim. App. 1989) (describing the ranger's alleged conduct). The Fifth Circuit evidently found this allegation too equivocal to state a claim against the prosecutor, for while the court noted that the prosector was immune from other claims, it did not address the coercion claim. *See Brandley*, 64 F.3d at 201 (observing that a prosecutor enjoys absolute immunity even where he "knowingly used perjured testimony, deliberately withheld exculpatory information, and failed to make disclosure of all facts casting doubt upon the state's testimony") (citation omitted). Thus, far from conflicting with the D.C. Circuit's decision that preindictment witness interrogations designed to elicit new and false testimony are investigatory rather than advocatory in nature, *Brandley* did not even consider the issue.

The only post-*Buckley* case to consider this issue is the Second Circuit's decision in *Hill v. City of New York*, 45 F.3d 653 (2d Cir. 1995), which Valder curiously failed to cite in the petition. In *Hill*, the plaintiff alleged that a prosecutor had coerced a young witness into giving false testimony. Although the testimony was videotaped for the express purpose of presenting it to the grand jury and was, in fact, presented to the grand jury six days after it was recorded, the Second Circuit refused to find the prosecutor absolutely immune. *See* 45 F.3d at 662-63. Citing *Buckley*, the

---

testimony. 871 F.2d at 346.

Second Circuit reasoned that "if the videotapes were made to collect or corroborate evidence against Hill in order to get probable cause to arrest her, the act of making the tapes receives only qualified immunity." *Id.* at 662. As the interview in that case could, consistent with the pleadings in the case, have been conducted prior to the prosecutor obtaining probable cause, the Second Circuit refused to find the prosecutor's conduct absolutely immune from suit. *See id.* at 663. Thus, far from conflicting with the decisions of other courts, the decision below is consistent with the only analogous appellate decision applying *Buckley*.

III. THE DECISION BELOW DOES NOT PRESENT ANY ISSUE WARRANTING THIS COURT'S REVIEW

Valder contends (Pet. 3, 23) that the decision below "establishes exceptions to the rule of absolute immunity that swallow the rationale for the rule itself" and that it threatens to "overturn twenty years of this Court's precedents and an entire body of common law immunity decisions." This is empty rhetoric. As shown above, *see supra* pp. 10-13, 14, far from announcing any broad, new principle, the opinion below simply applies this Court's decision in *Buckley* to the specific facts of this case.

It is significant that the Department of Justice did not mention the dire consequences Valder predicts in the petition for rehearing it filed on Valder's behalf before the D.C. Circuit. For example, although the Department of Justice employs more than 4,000 prosecutors, *see* United States Department of Justice, *Legal Activities 1995-96* 3 (1995), the United States never suggested that the decision below would overturn the entire body of common law immunity decisions. Moreover, the Department of Justice declined to seek certiorari, which is hardly the response one would expect if the decision below really threatened to undermine prosecutorial immunity.

Finally, contrary to Valder's suggestion, the decision below does not leave prosecutors at the mercy of frivolous and vexatious complaints. Qualified immunity — which protects government officials against liability so long as they do not violate any

clearly-established rights (*see Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)) — "provides ample protection to all but the plainly incompetent or those who knowingly violate the law." *Malley v. Briggs*, 475 U.S. 335, 341 (1986).[7] True, the qualified immunity standard does not leave prosecutors wholly free of concern when they interrogate witnesses and may lead them to hesitate to use certain techniques. This, however, is "precisely the point of the [qualified immunity] standard: Where an official could be expected to know his conduct would violate statutory or constitutional rights, he *should* be made to hesitate." *Mitchell v. Forsyth*, 472 U.S. 511, 524 (1985) (quotation omitted) (emphasis in original).

---

[7] Qualified immunity provides more than sufficient protection against the difficulties petitioner asserts (Pet. 18) courts will have in "drawing a clear line between proper assertiveness and 'coercion'" when a prosecutor is interviewing a witness. If the line is unclear, the right will not be clearly established and the official will be immune from suit. *See Harlow*, 457 U.S. at 818.

CONCLUSION

For the reasons stated above, the petition for certiorari should be denied.

Respectfully submitted,

Timothy B. Dyk
(Counsel of Record)
James E. Anklam
Daniel J. Bromberg
Jones, Day, Reavis & Pogue
1450 G St., N.W.
Washington, DC 20005-2088
(202) 879-3939

Paul Michael Pohl
John J. Mead
Ira L. Podheiser
Jones, Day, Reavis & Pogue
One Mellon Bank Center
31st Floor
Pittsburgh, PA 15219
(412) 391-3939

Counsel for Respondent

July 15, 1996

APPENDIX

[Filed Jan. 23, 1996]

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 93-5341 September Term, 1995
92cv02288

William G. Moore, Jr.,
Appellant
v.
Joseph B. Valder, et al.

And consolidated case No. 93-5343

BEFORE: Edwards, Chief Judge; Wald and Henderson, Circuit Judges

ORDER

Upon consideration of appellees' Suggestion for Rehearing In Banc, the response thereto, and the absence of request by any member of the court for a vote, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/Robert A. Bonner
Robert A. Bonner
Deputy Clerk

[Filed Jan. 23, 1996]

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 93-5341 September Term, 1995
92cv02288

William G. Moore, Jr.,
Appellant
v.
Joseph B. Valder, et al.

And consolidated case No. 93-5343

BEFORE: Edwards, Chief Judge; Wald, Silberman, Buckley, Williams, Ginsburg, Sentelle, Henderson, Randolph, Rogers and Tatel, Circuit Judges

ORDER

Upon consideration of appellees' Suggestion for Rehearing In Banc, the response thereto, and the absence of request by any member of the court for a vote, it is

ORDERED that the suggestion be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/Robert A. Bonner
Robert A. Bonner
Deputy Clerk

DUNNELLS, DUVALL, BENNETT & PORTER
ATTORNEYS AT LAW
2100 PENNSYLVANIA AVENUE, N.W.
WASHINGTON, D.C. 20037

November 30, 1989

VIA HAND DELIVERY
Michael E. Shaheen, Jr., Esq.
Counsel, Office of Professional Responsibility
United States Department of Justice
10th & Constitution Avenue, N.W.
Room 4304
Washington, D.C. 20530

Re: *United States of America v. Recognition Equipment Incorporated, et al.*, Cr. No. 88-0385

Dear Mr. Shaheen:

Defense counsel in the above-entitled case are forwarding to you relevant materials regarding our Motion to Dismiss Due To Prosecutorial Misconduct. We enclose the following:

1. Defendants' Joint Motion and Memorandum to Dismiss the Indictment With Prejudice Due To Prosecutorial Misconduct.

2. Exhibits To Defendants' Joint Motion to Dismiss.

3. Transcript of Proceedings, *United States of America v. Recognition Equipment, Incorporated, et al.*, Thursday, November 2, 1989, pages 3304-3315.

4. Government's Opposition to Defendants' Joint Motion to Dismiss the Indictment.

5. Defendants' Reply to Government's Opposition.

6. The Court's Memorandum Opinion and Order granting Defendants' Joint Motion for Judgment of Acquittal.

Because the Court granted our Motions for Judgment of Acquittal following the government's case, the Motion to Dismiss was denied as moot. However, we believe that the conduct documented in the pleadings and transcript should be investigated by your office.

In addition to the matters contained in the pleadings, we respectfully submit that there is at least one other significant issue which should be examined. Following Assistant United States Attorney Valder's decision to seek an indictment, counsel to the defendants provided a joint submission, 300 pages in length, describing what we believed to be the evidence in this case and establishing that this case did not support an indictment. This submission was reviewed by the United States Attorney for the District of Columbia and by the staff of the Assistant Attorney General in charge of the Criminal Division. Our appeals were rejected. We question whether candid and complete information was provided to the reviewers. Particularly, we must question whether the reviewing authorities were fully aware of the exculpatory evidence which was available to the prosecutor and the Postal Inspectors, including that the coconspirator repeatedly told Mr. Valder and the Postal Inspectors that the defendants were not told of the illicit payoffs to Mr. Voss and that a key immunized witness (Spartin) told a polygraph examiner in a 53 page statement (*see* Exhibit B to our Motion to Dismiss) on approximately 19 different occasions that he did not tell the defendants about the payoff scheme and to his knowledge the defendants did not know. We also must question whether the reviewing authorities were aware of the fact that Spartin was allowed to review the Grand Jury statements of four other coconspirator in violation of Rule 6(e).

If Mr. Valder obtained the approval to go forward with the indictment without this information being provided to the reviewing authorities, then we submit the reviews were meaningless and the decision of the Department of Justice in this

important case was made on a misleading record. Had all the information been provided to the reviewing authorities as part of the proper review of this matter, we believe that prosecution would have been declined. The carefully considered opinion of the Court granting our Rule 29 Motion for Judgment of Acquittal supports this conclusion and is based upon a record identical in all significant respects to that described in the defendants' joint submission referenced above.

The decision to indict was a bad one, and it was devastating to the defendants.

We would appreciate your acknowledging receipt of these materials.

Sincerely,

/s/Robert S. Bennett
Robert S. Bennett
Dunnells, Duvall, Bennett
& Porter
Counsel for Robert W. Reedy

/s/Marshall Searcy
Marshall Searcy
Locke Purnell Rain Harrell
Counsel for Recognition
Equipment Incorporated

/s/John P. Cooney, J.
John P. Cooney, Jr.
Davis Polk & Wardwell
Counsel for Recognition
Equipment Incorporated

/s/Charles A. Stillman
Charles A. Stillman
Stillman, Friedman &
Shaw, P.C.
Counsel for William G. Moore

Office of Professional Responsibility
Washington, D.C. 20530

May 30, 1991

Robert S. Bennett, Esquire
Skadden, Arps, Slate, Meagher & Flom
1440 New York Avenue, N.W.
Washington, D.C. 20005-2107

Dear Mr. Bennett:

We have completed our inquiry into allegations of misconduct you made against Assistant U.S. Attorney Joseph B. Valder arising from the prosecution of *United States v. Recognition Equipment Incorporated, et al.* As more fully set forth below, we have concluded that the allegation that the grand jury was misled regarding the state of knowledge of the defendants can not be sustained. Moreover, we have concluded that the supervisory review of the indictment was not tainted by misrepresentations regarding the state of knowledge of the defendants. As a result, we found that there was a sufficient basis for bringing the indictment. We also found several instances of actions by AUSA Valder which we believe merit further attention by the Department. Accordingly, we have forwarded those matters to the Executive Office for U.S. Attorneys for further consideration. We now consider the matter to be closed.

We have carefully examined the issue of whether or not the grand jury which returned the indictment in this case was misled regarding the state of knowledge of the defendants. Our examination of the record has convinced us that the grand jury was never under the impression that the defendants had actual knowledge of the criminal activity of the Voss-Gnau conspiracy. Moreover, we are also satisfied that the grand jury was not led to believe that the defendants' knowledge was based upon anything other than circumstantial evidence. We are constrained from providing any additional details of the grand jury's state of

knowledge because of the limited release of grand jury materials in this case.

We have also considered the question of whether the supervisory review of the proposed indictment within the U.S. Attorney's Office and the Department of Justice was flawed because of misrepresentations as to the state of knowledge of the defendants. We similarly found that the reviewers were well aware of both the circumstantial nature of the case and the difficulties of proof which the case presented. This proposed indictment received extraordinary review within the U.S. Attorney's Office; the decision to indict was not reached without long and comprehensive debate. Ultimately, however, the United States Attorney made a decision to proceed with an indictment.

The supervisory process that resulted in that decision was exhaustive. There were numerous meetings at which the merits of the case were debated and analyzed. Memoranda which scrutinized each count of the proposed indictment were prepared and circulated. In the course of that procedure, the indictment was modified and refined several times before final approval. As a result, the problem areas of the case, including the state of knowledge of the defendants, were identified and fully considered. In addition, extensive presentations on behalf of the defendants were made to both the U.S. Attorney and the Department prior to the approval of the indictment, and those presentations produced even more supervisory review, further analysis of the case, and additional fine-tuning of the indictment. In the light of the extensive and extraordinary review afforded this matter, we cannot conclude that the review process for this indictment was deficient.

It would be easy, given the benefit of hindsight, to conclude that in light of the judgment of acquittal the decision to indict was clearly incorrect. Accordingly, our standard of review has been to determine whether there was a rational basis for the U.S. Attorney's decision. Our examination of the record has led us to the conclusion that sufficient evidence supported the government's theory of the case. Our analysis of that evidence, including, *e.g.*,

the apparently missing pages from Mr. Moore's spiral notebooks and Mr. Reedy's apparently false statements to the Postal Inspectors, as well as his seemingly conscious disregard for the signals — "it's better that you don't know about the relationship between Gnau and Voss" — he was receiving, led us to the conclusion that there was a rational basis for the U.S. Attorney to conclude that there was a probability of a conviction if the case were indicted.

We turn next to specific complaints concerning the procedures used by the government in its presentation of the evidence to the grand jury. We first examined the use of witness summary statements before the grand jury as a means of streamlining the presentation of testimony. While we are satisfied that the use of summaries is legally permissible, we are concerned that their use creates the appearance that the government is seeking to tailor testimony. However, the fact that the witnesses were made available to the grand jury and that questions were asked of the witnesses beyond the limits of the statements, together with our review of the grand jury materials, led us to the conclusion that the government did not seek to tailor the testimony. We remain concerned about the appearance problem, and we intend to discuss it with the Executive Office of U.S. Attorneys.

Next, we considered the allegation that the government elicited an opinion from one grand jury witness, Mr. William Spartin, regarding his belief as to the state of knowledge of the defendants while refusing to permit another grand jury witness, Mr. Frank Bray, to state a contrary opinion. While we are satisfied that there was ample evidence beyond the opinion testimony to support the indictment, the disparate treatment of the two witnesses compounds the appearance problem created by the use of the summary statements. Moreover, we are concerned that Mr. Bray was restricted in his desire to include additional testimony in his statement. While a prosecutor may properly object to a witness's seeking to include extraneous or irrelevant information in a statement, in this instance it cannot be said that the opinion statement was irrelevant since the prosecutor had elicited an opinion on the same subject from Mr. Spartin. Accordingly, we

must conclude that the prosecutor exercised poor judgment when he refused to allow the witness to amend his statement to include his opinion. At the same time, however, we are satisfied that the prosecutor excluded the opinion solely because he believed that witness did not possess sufficient information to offer a competent opinion.

We also examined the circumstances surrounding the cooperation of Mr. Spartin with the government. Mr. Spartin was a key player in the Voss-Gnau conspiracy which gave rise to the instant prosecution. When the government obtained Mr. Spartin's cooperation and began to debrief him, he failed to recall numerous events — such as being in a particular city on a particular date — at which others had irrefutably placed him. This failure was so pervasive that, after consulting with his supervisors, the prosecutor dramatically confronted Mr. Spartin with his faulty memory by tearing up his non-prosecution letter. That action was not taken as a consequence of Mr. Spartin's inability to implicate directly the REI defendants, but solely because he could not recall attending a number of meetings where others had unequivocally placed him. That being the case, we cannot conclude that the prosecutor's actions were unwarranted nor can we conclude they were motivated by the prosecutor's displeasure with Mr. Spartin's inability to implicate directly the REI defendants.

Similarly, we examined the claim that the prosecutor threatened to prosecute Mr. Spartin's son if he did not implicate the REI defendants. We found no support for that contention. Rather, as a consequence of Mr. Spartin's failure to recall certain meetings, the prosecutor told him only that his son would be served with a grand jury subpoena to testify about the various meetings which he was aware that his father had attended.

We also examined the use of the witness statements of other witnesses to refresh Mr. Spartin's recollection. Mr. Spratin was given the statements of other witnesses who placed him at various meetings which he could not recall. In one instance, he was given a copy of a statement which indicated that it was a grand

jury exhibit. We have reviewed the conflicting legal authority on what constitutes grand jury material, and while there is ample precedent supporting the proposition that statements created outside of the grand jury may be used without Rule 6(e) restrictions, it is clear that use of the document which specifically indicated its use in the grand jury must, at least technically, be treated as subject to Rule 6(e) restrictions. Accordingly, we reviewed the Department's policy regarding the use of the statement to refresh Mr. Spartin's recollection. Our review revealed that the Department considers permissible the use by a prosecutor of grand jury material to refresh a witness's recollection. Based upon that policy, we cannot conclude that the prosecutor's actions constitute a 6(e) violation. Moreover, under the Department's construction of Rule 6(e), a copy of the statement which did not clearly indicate its grand jury connection could have been used without even technically implicating Rule 6(e).

We examined the circumstances regarding the apparent loss of a draft of Mr. Bray's witness statement. There was a great deal of negotiation over the text of Mr. Bray's statement, and it went through several evolutions. The controversy arose over the refusal of the prosecutor to allow Mr. Bray to include in his statement various information including his opinion on the lack of knowledge by the REI defendants. As a result the defense was very interested in the drafts of Mr. Bray's statements. In the course of the trial, the prosecutor offered various explanations for the failure of the government to find the statement, some of which were inconsistent. Our inquiry shed little additional light on the whereabouts of the statement at issue. We do not believe, however, that it was either intentionally or negligently destroyed. Indeed, there is some evidence that the draft statement which was produced was actually the statement in question, but that could not be definitively established. Nevertheless, we are concerned with the prosecutor's handling of this aspect of the case. We do not believe that the prosecutor exercised sound judgment when he asked leading questions of the witness which he should have

known rested upon a faulty premise and which thereby led to questions regarding his candor and credibility on the matter.

We next examined allegations that the prosecutor failed to comply with his obligations under *Brady v. Maryland* and misled the court concerning his compliance. We found the prosecutor's compliance with the court's April 6, 1989 discovery order to have been deficient. The court specifically ordered that the government provide to the defense "any statements to the effect that the defendants were not involved in, or did not know of, the Voss-Gnau conspiracy[,]" 711 F. Supp. 1, 14 (D.D.C. 1989). Moreover, at a pretrial hearing on July 11, 1989, the court indicated that the prosecutor was to provide even "borderline" *Brady* material (pretrial conference transcript at 60). That was not done. We are particularly concerned with the failure to provide to the defense, at least following the pretrial conference, the text of the polygraph examination of Mr. Spartin wherein he made some nineteen references to the defendants' lack of knowledge of the Voss-Gnau conspiracy. Similarly, we are concerned that the prosecutor's response to the court with respect to *Brady* compliance contained in his June 13, 1989 letter was inaccurate.[1] Both the omission of the Spartin polygraph and the inaccurate letter to the court merit further review by the Executive Office for U.S. Attorneys.

---

[1] In the June 13, 1989 letter which was written to defense counsel with a copy to the court, AUSA Valder stated that the government was "in compliance with the court's discovery orders in this case." In fact, as noted, the court had ordered the government to produce to the defense "any statements" indicating the defendants lack of knowledge of the Voss-Gnau conspiracy. The transcript of the polygraph examination of William Spartin contains some nineteen instances of Spartin telling the examiner that the defendants did not know of the Voss-Gnau conspiracy. The document had not been produced at the time of the June 13, 1989 letter. AUSA Valder has not contended that the transcript of Spartin's polygraph examination was unknown to him at the time he wrote the letter.

We also considered the question of the contracts by the Postal Inspectors with former Postmaster General Carlin. It was alleged that the Inspectors, in one instance, gave Mr. Carlin a copy of the draft indictment in the *REI* case and, in a second instance, allowed Mr. Carlin to review witness statements taken by the Postal Inspectors which the defense contended were grand jury material. We are unable to conclude that Mr. Carlin was given a copy of a draft indictment. Rather, we found that AUSA Valder instructed the Inspectors to verify two dates with Mr. Carlin. We found that the request to verify the dates was entirely proper, and we found that AUSA Valder did not instruct the Inspector to permit Mr. Carlin to review any proposed counts in an indictment. Even assuming that the Inspector allowed Mr. Carlin to read the text of the proposed count, we cannot conclude that such action by the Inspector was directed by AUSA Valder.[2] Second, we found that AUSA Valder had no role in the briefing of Mr. Carlin on the results of a separate inquiry conducted by the Postal Inspectors. Accordingly, we found no misconduct by AUSA Valder since he had nothing to do with the briefing of Mr. Carlin by Inspector McIntosh.

Finally, we examined the totality of the prosecutor's conduct in this matter. Our inquiry did not establish that the prosecutor's actions were part of a cover-up of misconduct. We found no support for the argument that the prosecutor had misled the grand jury. Similarly, we concluded that the prosecutor did not impermissibly tailor the witnesses' testimony. Moreover, we found that the supervisory indictment review process considered the problem areas of the case, but concluded that they could be overcome. Accordingly, we concluded that the broad based claim of misconduct with supporting cover-up must fail. Based upon

---

[2] There is authority for the proposition that a draft indictment is not grand jury material covered by Rule 6(e) of the Federal Rules of Criminal Procedure. We are not deciding here whether or not a draft indictment is covered, rather we have concluded that AUSA Valder did not engage in misconduct in this matter simply by having the Inspector verify a date he planned to include in his indictment.

our inquiry, we have also concluded that there was simply no intent on the part of the prosecutor to do anything other than to present this case to the best of his ability. Indeed, the deficiencies we have identified in this case simply do not rise to the level of serious misconduct, and fall exceedingly short of the misconduct identified by the *Omni* case to which this case has been compared. Here, when the court previously reviewed allegations of misconduct by the prosecutor it concluded that the prosecutor had not engaged in misconduct, 711 F. Supp. 1, 11-13 (D.D.C. 1989). Indeed, the court concluded that "[e]ven accepting the defendants' allegations as true, the alleged prosecutorial misconduct was not significant enough * * * either to justify on its own a motion to dismiss the indictment or [even] to justify granting discovery of the entire grand jury transcript[,]" *id.* at 13. That is consistent with the findings of our inquiry, and it is entirely inapposite to Judge Black's findings in *Omni*.

Thank you again for bringing this matter to our attention.

Sincerely,

MICHAEL E. SHAHEEN JR.
COUNSEL

By: /s/J. Thomas Ezell
J. Thomas Ezell
Assistant Counsel

Office of Professional Responsibility
Washington, D.C. 20530

August 1, 1991

Jay B. Stephens, Esquire
United States Attorney
District of Columbia
555 Fourth Street, N.W.
Washington, D.C. 20001

Dear Mr. Stephens:

This is in response to Principal Assistant U.S. Attorney William Birney's letter of June 13, 1991, in which he sought, on behalf of AUSA Joseph Valder, reconsideration of our decision finding AUSA Valder's compliance with the court's discovery order in *United States v. Recognition Equipment, Inc.*, et al. to have been "deficient." That finding was based upon our understanding of AUSA Valder's handling of the transcript of the polygraph examination of William Spartin, in which he made a number of statements which were exculpatory to the defendants.

Although there was extensive discussion with AUSA Valder regarding numerous issues in this complicated case, including the polygraph examination of Mr. Spartin, neither we nor AUSA Valder focused upon the fact that, in compliance with the court's discovery order, he had provided defense counsel with extensive quotes from the transcript of the polygraph examination. Indeed, AUSA Valder's letter to all defense counsel of June 7, 1989, contains the exculpatory statements as reported in the transcript of the polygraph examination. While the letter does not include additional statements by Mr. Spartin that he was not present when any of the defendants were told of the Voss-Gnau conspiracy (we believe the better course would have been to provide those statements at that time), AUSA Valder has demonstrated that his disclosure of June 7, 1989, met the letter of the court's discovery order. Accordingly, we must conclude that AUSA Valder's compliance with the discovery order was not deficient.

With respect to AUSA Valder's request that we "reconsider referring the matter to the Executive Office" regarding the other findings in our original decision, we decline to take such action. Our referral to the Executive Office is routine in matters in which Assistant U.S. Attorneys are involved, and we see no basis to deviate from that procedure here. Accordingly, by a copy of this letter, we will advise the Executive Office of our decision that AUSA Valder was not deficient in his compliance with the court's discovery order.[1] Any further action with respect to the other matters identified in our May 30, 1991 letter to Mr. Bennett is entirely within the discretion of the Executive Office.

Thank you for your continuing cooperation. If you have any questions, please contact me or Assistant Counsel Tom Ezell on 514-3365.

Sincerely,

/s/Michael E. Shaheen Jr.
Michael E. Shaheen Jr.
Counsel

---

[1] Copies of this letter will also be sent to Mr. Bennett and the other defense counsel to advise them of our conclusion that AUSA Valder was not deficient in his compliance with the court's discovery order.

STATE OF TEXAS	)	
	)	
	)	Civil Action
	)	No. 3-91CV2491-G
DALLAS COUNTY	)	

AFFIDAVIT OF WILLIAM G. MOORE, JR.

William G. Moore, Jr., being first duly sworn according to law states:

1. My name is William G. Moore, Jr., I reside at 4720 Northaven Road, Dallas, TX 75229. My date of birth is April 12, 1939. I am under no legal disability which would render me incompetent to make this affidavit.

* * * *

34. In 1983 I was asked to be chairman of the Dallas Mayor's High Technology Task Force. In 1984 I was honored as Dallas/Ft. Worth Businessman of the Year (see attached Dallas Ft. Worth Business Journal article). In 1985, I was elected Chairman of the American Electronics Association (AEA) In 1987 President Reagan appointed me to the Advisory Committee For Trade Negotiations (ACTN) made up of the CEO's of some of America's most prestigious companies including IBM, 3-M, Boeing, etc. ACTN was chaired by James Robinson of American Express and interfaced directly with the United States Trade Representative (USTR), Clayton Yeutter. I was invited and agreed to join numerous public interest boards, including the Boys Clubs of America, Boy Scouts of America, and the Public Broadcasting System (KERA — Channel 13) in Dallas.

/s/William G. Moore, Jr.
William G. Moore, Jr.

Sworn To And Subscribed
before me this 28th day of June, 1990.
/s/Cynthia A. Langford
Notary Public
[SEAL]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

WILLIAM G. MOORE, JR. and BLANCHE K. MOORE,	)	
Plaintiffs,	)	
v.	)	
JOSEPH B. VALDER, MICHAEL HARTMAN, FRANK KORMANN, ROBERT EDWARDS, PIERCE MCINTOSH, DANIEL HARRINGTON, (first name unknown) ROBBINS, and OTHERS as of yet unknown, hereby designated as Joe Doe defendants 1-25,	)	Civil Action No. 3-91CV2491-G
Defendants.	)	
STATE OF FLORIDA	)	
	)	SS:
COUNTY OF INDIAN RIVER	)	

AFFIDAVIT OF WILLIAM C. HITTINGER

Before me, the undersigned authority, personally appeared William C. Hittinger, who being first duly sworn according to law, deposes and states as follows:

1. My name is William Hittinger. I reside at 149 Bellevue Avenue, Summit, NJ 07901.

2. I serve on the Board of Directors of Recognition Equipment, Inc. ("REI") and have done so for more than ten years. I hold a Bachelors Degree from Lehigh University, from

which I have also received an honorary doctorate. I am presently the Chairman of the Board of Trustees at Lehigh and have served on that Board since 1972. I am also a member of the Board of Directors of Bethlehem Steel Corporation, UNC Corporation, Thomas and Betts Corporation and The Stabler Companies. I have served on numerous other civic and charitable organizations and committees, including the National Security Telecommunications Advisory Council, a commission which reported to the President of the United States, and I was appointed to serve on the Presidential Commission on United States-Brazil Technology.

3. Following my graduation from Lehigh University and service in the U.S. Army during World War II, I was employed by Western Electric and National Union Radio Corporation before joining Bell Laboratories in 1954. I was eventually promoted to the position of Executive Director of Semiconductor and Electric Tube Division, and from 1966 to 1968 I was President of Bellcomm, Inc., a subsidiary of AT&T. In that capacity, I worked on the Apollo Space Program. From 1968 to 1970, I was President of General Instrument Corporation. From 1970 to 1986, I was employed by RCA, from which I retired as an Executive Vice President in 1986.

4. I first met William G. ("Bill") Moore, Jr., in about 1981 when, in my capacity as a Director of REI, I interviewed him as part of REI's search for a new president. He was subsequently hired by REI as Chief Executive Officer and President and eventually was elected Chairman of the Board of Directors as well.

5. In late 1987 to 1988, I was asked to testify before a grand jury in Washington, D.C. in connection with what I understood to be an investigation of REI and the activities of Bill Moore and others. I was not accompanied by counsel when I appeared to testify.

6. The day of my testimony, as I recall, I had lunch with Assistant U.S. Attorney Joseph Valder and two men whom I understood to be postal inspectors assisting Mr. Valder in the

investigation. That conversation was memorable to me because at one point, Mr. Valder stated in substance that the merits of the case or whether the persons involved were guilty or not did not concern him. He explained that it was important to him that he win the case because he wanted to get a track record or some notoriety which would help him obtain a good position in private practice. He explained that his career objectives went beyond the Department of Justice and that the REI case meant a lot to him and his career. The substance of his conversation was that he wanted to get a conviction in that matter because he thought it would help him land a lucrative position in corporate law.

I was shocked and infuriated that he seemed not to be interested in fairly assessing the merits of the case but saw the investigative proceeding as his opportunity to get a significant "win" for his career advancement. This was inconsistent with my understanding of how a federal prosecutor was supposed to act, and it upset me greatly. I later reported the conversation to company counsel.

7. When I testified before the grand jury, I felt that I was berated by Mr. Valder with respect to how the Board of Directors of REI and I, as Chairman of its Compensation Committee, construed a financial compensation package for Bill Moore. Mr. Valder seemed to want to make it appear to the grand jury that there was something improper about the compensation being paid to Mr. Moore. This seemed to me to be not fairly related to what I understood were the matters under investigation, and I recall that his approach troubled me as being unfair. I did my best to explain how carefully we had worked to evaluate comparable compensation packages for executives in other companies and how executive compensation generally is established.

I have read the foregoing affidavit, and I swear that the facts contained therein are true and correct to the best of my personal knowledge, information and belief.

/s/William C. Hittinger
William C. Hittinger

SWORN TO AND SUBSCRIBED
before me this 28th day
of March, 1992.

/s/Aubrey J. Lanier
Notary Public

[SEAL]

TRANSCRIPT
OF PROCEEDINGS
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA, Plaintiff,	:	
v.	:	Criminal Action Number CR 88-0385
RECOGNITION EQUIPMENT, INCORPORATED, WILLIAM G. MOORE, JR., ROBERT W. REEDY, Defendants.	:	

Washington, D.C.
Wednesday, October 18, 1989

* * * *

[Redirect Examination: Frank Bray]

[1824]* * * *

Q And do you recall my offering you and your attorney the opportunity to not do a summary at all but for you to come before the Grand Jury, and if it was necessary, we would take five entire days or seven entire days, however long it took, for you to respond in question and answer form with me to cover the range of what you knew?

[1825]

A Yes, sir.

[1]

ROBBINS: Testing for polygraph examination at Washington, DC on December 5, 1986, testing, testing, for polygraph examination, December 5 at Washington, DC, December 5, 1986. I'm gonna tape record everything we do here today and you have had several polygraph tests, I understand, over the past five or six months.

SPARTIN: That is correct, I've had three.

ROBBINS: Three tests. When was the last test you had?

SPARTIN: Last week

ROBBINS: Did you take that over in Virginia?

SPARTIN: Yes sir, I did.

ROBBINS: How long did it take to do that?

SPARTIN: Oh I guess from the time we started until I left about an hour.

ROBBINS: Your first name is William?

SPARTIN: William, yes sir.

ROBBINS: You have a middle name?

SPARTIN: Yes I do, Anthony.

ROBBINS: S-P-A-R-T-I-N? Where were you born?

SPARTIN: Chicago.

ROBBINS: When?

SPARTIN: October 5, 1929, makes me 57.

ROBBINS: Where do you live?

SPARTIN: I live at 10801 Stanmore, S-t-a-n-m-o-r-e Drive, Potomac, MD

ROBBINS: How long you lived there?

SPARTIN: Since '75, 10-11 years.

ROBBINS: Who lives there with you?

SPARTIN: My wife and various children from time to time. We have four children. They have been in and out.

ROBBINS: And what's your wife's name?

SPARTIN: Cleo, C-l-e-o. * * * *

[16]* * * *

[SPARTAN]: To my knowledge, REI didn't know about the deal, meaning the conspiracy and bribery. I never told them and there's a feeling around that REI knew about the whole thing and I didn't tell them, so I don't know if REI did or not. * * * *

[19]* * * *

ROBBINS: What would you talk about? Was REI aware that there was finagling going on with the contract? That there was unfair advantage being taken on the part of Voss and Gnau?

SPARTIN: I think, sir, that REI had to be pleased as punch when they saw the bid go out because it was written very narrowly. Now, did I tell REI about that? No.

ROBBINS: Alright, who did?

SPARTIN: I don't know. I can speculate but I can't give you, I've tried to avoid putting other people into the soup on this thing if I don't know to the fact. If I say to you I can speculate, I can speculate. If you want me to speculate, I will. * * * *

[20]* * * *

ROBBINS: Did you or anyone at REI know that Peter Voss was getting paid as part of that thing?

SPARTIN: To my knowledge, no sir.

ROBBINS: You never discussed it with them?

SPARTIN: I did not discuss it with them.

ROBBINS: Were you ever present when anyone talked to them about Voss about getting any money?

SPARTIN: No sir.

ROBBINS: Was Peter Voss ever at any meetings with REI?

SPARTIN: He was never at any of our meetings with REI. . . . * * * *

SPARTIN: To my knowledge, REI did not know anything about bribing Pete Voss nor did he knew anything about the agreement in terms that Peter Voss was part of it.

ROBBINS: You didn't tell them.

SPARTIN: I did not tell them, no sir.

ROBBINS: You were never present when REI people discussed such a thing?

SPARTIN: No sir, I was not.

ROBBINS: You never overheard anyone tell anyone from REI. . . .

SPARTIN: No sir.

ROBBINS: . . . . that Voss getting paid from John Gnau?

SPARTIN: No sir. * * * *

[28]* * * *

ROBBINS: Do you have any knowledge about whether anyone in REI knew Pete Voss was involved in this scheme to get them the sole source contract? Or was being paid?

SPARTIN: Let me answer you this way. Being paid, no sir, I don't. I have no knowledge of that at all. Peter Voss being part of the deal, no knowledge. But, you know I read that goddamn testimony and I'm not a lawyer but Jesus, there's enough there to seem to me to hang REI from the yardarm. REI, Voss told REI to use Gnau and I didn't read this anywhere. John Gnau told me that and I told that to the Inspectors. * * * *

[36]* * * *

ROBBINS: . . . Okay one of the questions I want to ask you, Bill, is were you present when anyone in REI was told that Gnau was paying Voss to help REI get the Post Office contract and what was your answer to that question?

SPARTIN: Was I present? No.

ROBBINS: Do you have any knowledge that anyone in was told that?

SPARTIN: I only have my suspicions. I think between you and I and this wall that John Gnau was very close to Bob Reedy and John has a tendency to talk. John's a talker, can't keep a secret if his life depended on it. My gut tells me that John and Reedy are a lot closer than people think. So to answer to that question, read it again to me.

ROBBINS: Okay, my question is, were you present when anyone in REI was told that Gnau was paying Voss to help REI get a post office contract?

SPARTIN: No.

ROBBINS: But your feeling is that John Gnau probably did.

SPARTIN: Yeah, I have a suspicion that there's more than meets the eye, that's what I'm trying to tell you.

ROBBINS: John Gnau, did he ever tell you that he told anybody at REI?

SPARTIN: John never shared, if you can believe this, here we were sort of friends, business friends, he never told me anything he was basically doing. John never told me about it. * * * *

[40]* * * *

ROBBINS: I want you to tell me how you're gonna answer it. Have you lied to me today about the facts in this case?

SPARTIN: No.

ROBBINS: Were you present when anyone in REI was told that Gnau was paying Voss to help REI to get a post office contract?

SPARTIN: No.

ROBBINS: Since your April 7 agreement with the government, have you planned with anyone to conceal any facts about this case?

SPARTIN: No. * * * *

[43]* * * *

ROBBINS: Were you present when anyone in REI was told that Gnau was paying Voss to help REI get a post office contract?

SPARTIN: No. * * * *

[45]* * * *

ROBBINS: Were you present when anyone at REI was told that Gnau was paying Voss to help REI get a post office contract?

SPARTIN: No. * * * *

[48]* * * *

ROBBINS: Were you present when anyone in REI was told that Gnau was paying Voss to help REI get a post office contract?

SPARTIN: No. * * * *

[49]* * * *

SPARTIN: It's so bad I want to help, I just don't know how, that's the problem.

ROBBINS: Well, you can't help anything on this test. Just sit quietly and answer the questions.

SPARTIN: I don't mean just this test, I mean this whole mess. If I just could be more helpful.

ROBBINS: If you knew something on REI you'd tell us.

SPARTIN: Boy, would I tell you, I got nothing to lose. It's stupid not to tell. Even John McKean, that man, has probably cut more side deals than anybody, but I can't make up a story.

* * * *

[50]* * * *

ROBBINS: Were you present when anyone in REI was told that Gnau was paying Voss to help REI get a post office contract?

SPARTIN: No.* * * *

[51]* * * *

SPARTIN: I thought they played a dirty game with me because they tried to get my son involved.

ROBBINS: Who was that?

SPARTIN: The Inspector, the U.S. Attorney. My son is very dear to me, it's someone I love very much. He worked for me and they issued a subpoena for him to go down and report to the grand jury.

ROBBINS: They have issued one?

SPARTIN: That truly troubles me cause what they tried to tell me was look Spartin, you're in deep trouble. You've lied to us. We going to subpoena your son. We are going to charge him with obstruction of justice and we talked about that. That is the point that is troubling me.

Supreme Court, U.S.
FILED
JUL 31 1996
OFFICE OF THE CLERK

(3)

No. 95-2005

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1995

JOSEPH B. VALDER,

Petitioner,

v.

WILLIAM G. MOORE, JR.,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY TO RESPONDENT'S OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

George J. Terwilliger, III, *Counsel of Record*
E. Duncan Getchell, Jr.
James B. Comey
Laura A. Colombell
McGuire, Woods, Battle & Boothe, L.L.P.
1627 Eye Street, N.W.
Washington, D. C. 20006
(202) 857-1700

11pp

TABLE OF CONTENTS

SUMMARY OF ARGUMENT 1

ARGUMENT 2

CONCLUSION 8

TABLE OF AUTHORITIES

FEDERAL CASES

Brandley v. Keeshan, 64 F.3d 196 (5th Cir. 1995) . . . 6

Buckley v. Fitzsimmons,
509 U.S. 259 (1993) 2,7

Hill v. City of New York, 45 F.3d 653 (2d Cir. 1995) . 5

Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit,
507 U.S. 163 (1993) 2

Moore v. Valder,
65 F.3d 189 (D.C. Cir. 1995) 4,5,7

Tele-Communications of Key West, Inc. v. United States,
757 F.2d 1330 (D.C. Cir. 1985) 2

No. 95-2005

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1995

No. 95-2005

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1995

JOSEPH B. VALDER,

Petitioner,

v.

WILLIAM G. MOORE, JR.,

Respondent.

REPLY TO RESPONDENT'S OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

SUMMARY OF ARGUMENT

The court of appeals in this case departed from well-settled law by accepting that allegations of witness coercion and misuse of grand jury testimony involve conduct that is

simply not "prosecutorial." Respondent's Opposition necessitates a reply because it includes distortions of the record and raises new issues of law through mischaracterization of the court of appeal's decision. Respondent erroneously argues that the circuit court's decision was based on findings of fact rather than errors of law in adopting its new *per se* rules. As a matter of sound and established policy, allegations that a prosecutor obtained an indictment through false or perjured testimony have heretofore been found to lie within the core of absolute immunity. Allegations against prosecutors sounding in malicious prosecution have long been barred by absolute immunity. Under this Court's functional analysis, efforts to prepare and control witnesses are prosecutorial and not investigative.

This case was decided by the district court and the appeals court based on the allegations in Respondent's complaint, as is required on motions under Fed. R. Civ. P. 12(b)(6).[1] In his opposition, however, Respondent has attempted to defend the court of appeals decision by either ignoring or misstating his own allegations and has further confused the record by introducing a large amount of material that goes beyond the complaint and which played no part in the decisions below.

ARGUMENT

Although Respondent studiously avoids quoting from his own complaint, that document demonstrates that his attempt to recast the court of appeals opinion as a fact-bound application of *Buckley v. Fitzsimmons*, 509 U.S. 259 (1993)

---

[1] While the facts alleged must be taken as true, *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 164 (1993), the motion to dismiss is decided, and reviewed, solely on the basis of the facts set out in the complaint. *See, e.g., Tele-Communications of Key West, Inc. v. United States*, 757 F.2d 1330, 1335 (D.C. Cir. 1985). Respondent attempts to change this settled principle by declaring that "the facts asserted by respondent must be taken as true" (Resp. 2), and then proceeding to assert all manner of so called facts that are not found in the complaint.

is misplaced. The decision is not based on any of the facts Respondent now attempts to insert in the record, nor does it turn on an analysis under *Buckley* as to when in the pre-indictment process the alleged misconduct occurred. This was undoubtedly the case because Respondent's complaint alleged that *all* of Petitioner's misconduct occurred in the course of his drive to allegedly abuse the grand jury to obtain an otherwise unobtainable indictment of Respondent. Specifically, Moore charged that:

> Defendants engaged in unusual, unlawful, and unconstitutional investigative techniques to intimidate and coerce witnesses to try to implicate Moore and to control the flow of information to the Grand Jury in order to mislead the Grand Jury to return an indictment when none was warranted.

Complaint, at ¶ 16; Pet. App. 59a.

The alleged misconduct held by the court of appeals to be outside the scope of absolute immunity involved two particulars in the complaint. First, Moore alleged that AUSA Valder tore up the immunity letter previously supplied to witness William Spartin and threatened to prosecute his son, in an effort to "coerce" and "intimidate" Spartin into providing testimony against Moore and REI in the grand jury. Complaint, at ¶ 21; Pet. App. 61a.[2] Second, Valder allegedly showed Spartin "Grand Jury testimony of other witnesses for the purpose of influencing [his] testimony." Complaint, at ¶ 22; Pet. App. 61a.[3]

---

[2] Contrary to repeated statements in the Opposition (Resp. 6, 11), the complaint does not allege that Valder coerced Grand Jury witness Frank Bray. It appears that Respondent's source for this allegation is the trial testimony by Bray that has been attached as part of Respondent's appendix. *See* Resp. App. 21a.

[3] In the "Statement" portion of his opposition, Respondent has included a paragraph styled "The OPR Investigation." While this is another example of Moore's effort to distract from the actual *complaint*

The complaint restated its theory following these allegations by concluding: "Through the use of the above malicious, improper and unconstitutional tactics AUSA Valder . . . was able to obtain an indictment against [Moore]." Complaint, at ¶ 24; Pet. App. 62a.

The court of appeals relied on nothing more than the allegations in the complaint in announcing that two types of alleged misconduct were *per se* outside the bounds of absolute immunity. First, the court decreed that "[i]ntimidating and coercing witnesses into changing their testimony is not advocatory." *Moore v. Valder*, 65 F.3d 189, 194 (D.C. Cir. 1995); Pet. App. 13a. Instead, the court held, such conduct is "a misuse of investigative techniques legitimately directed at exploring whether witness testimony is truthful and complete . . .," and that it "therefore relates to a typical police function, the collection of information to be used in a prosecution." *Id.* Second, the court ruled that "disclosing grand jury testimony to third parties is not advocatory because it has no functional tie to the judicial

---

in this case, it must be observed that his characterization of the results of that investigation is grossly inaccurate and unfair, as demonstrated by a brief review of the Office of Professional Responsibility final report he attaches. *See, e.g.*, Resp. App. 13a ("there was simply no intent on the part of the prosecutor to do anything other than to present this case to the best of his ability"); 6a ("the allegation that the grand jury was misled regarding the state of knowledge of the defendants can not be sustained"); *id.* ("we found that there was sufficient basis for bringing the indictment"); 8a ("there was a rational basis for the U.S. Attorney to conclude that there was a probability of a conviction if the case were indicted"); *id.* ("the government did not seek to tailor the [grand jury] testimony"); 9a ("tearing up [Spartin's] non-prosecution letter . . . was not taken as a consequence of his inability to implicate [Moore and his codefendants] but solely because he could not recall attending a number of meetings where others had unequivocally placed him" and "we cannot conclude that the prosecutor's actions were unwarranted"); *id.* ("We found no support for [the] contention . . . that the prosecutor threatened to prosecute Spartin's son if he did not implicate [Moore and his co-defendants]"); 10a ("we cannot conclude that the prosecutor's actions [in using a grand jury exhibit to refresh Spartin] constitute a 6(e) violation"); 13a ("the deficiencies we have identified do not rise to the level of serious misconduct").

process." *Id.* at 195; Pet. App. 14a.

Despite Respondent's effort to recast the decision below by late-inning pleading, the appeals court did not base its decision on when the alleged misconduct took place with respect to a witness's appearance before the grand jury. Indeed, Respondent ignores that the two instances of alleged misconduct happened in the same functional context as the five others decreed by the appeals court to be barred by absolute immunity. There was no allegation below that Petitioner had engaged in some sort of pre-grand jury investigation and then moved on to present evidence in an effort to obtain an indictment; the crux of the complaint was that all the misconduct was part of a preconceived effort to subvert the grand jury process and maliciously prosecute Respondent.[4]

For that reason, the Second Circuit's decision in *Hill v. City of New York*, 45 F.3d 653 (2d Cir. 1995), cited as a "curious[]" omission from Valder's petition (Resp. 16), actually supports the petition. That decision turned on the fact that the prosecutor had not established that his videotaping of a witness statement was for the sole purpose of presenting it to the grand jury. 45 F.3d at 662. The Second Circuit specifically noted that absolute immunity would be available if the prosecutor, as was alleged here, had already decided to indict. *Id.* ("We recognize that a prosecutor is immune from liability for out-of-court efforts to control a witness' grand jury testimony that are made subsequent to the decision to indict.") (citing *Buckley*). The D.C. Circuit cited *Hill* for purposes of applying absolute immunity to certain of Moore's allegations. 65 F.3d at 194; Pet. App. 13a. The panel did not cite *Hill* in its challenged

---

[4] Despite Moore's new theory that Valder was really involved in a separable fact investigation *before* deciding to wrongly indict him, Respondent's own brief is unable to describe the case without revealing that it was a malicious prosecution action. *See, e.g.*, Resp. 4 (Valder and the postal inspectors were "retaliating against him for his criticisms of the postal service" and "decided to 'get' Moore" even though aware of his innocence).

holding that witness coercion was unprotected because, in this case, Moore's *claim* was that the prosecutor had decided to indict and engaged in the misconduct in pursuit of indictment. Indeed, the court of appeals could not rely on *Hill* and reach the result it pronounced.[5]

Respondent's effort to distinguish *Brandley v. Keeshan*, 64 F.3d 196, 201 (5th Cir. 1995) is mystifying. He asserts that the Fifth Circuit "did not address the coercion claim" in that case. On the contrary, the court recited that:

> Brandley asserts [the prosecutor] knew of and probably directed the intimidation of witnesses and suppression of other important evidence. The district court found that actions taken by [the prosecutor] were part of his efforts to prepare the State's case for trial and that such acts were wholly within the scope of his judicial function, citing *Imbler v. Pachtman* . . . . Taking Brandley's allegations as true, we hold that [the prosecutor] retained his absolute immunity from suit.

64 F.3d at 201. In short, the Fifth Circuit considered and rejected allegations of witness intimidation because it properly considered the context in which the allegations arose. *Brandley* is squarely in conflict with the decision below, which carves out all allegations of prosecutorial "intimidation" because, in that court's view, intimidation is police work.

Respondent is correct that a number of the other inconsistent cases from other circuits pre-date *Buckley*, but

---

[5] As part of Respondent's vain search for comfort that the case law cannot supply and in his most ambitious voyage outside the record, he argues that this Court should be influenced by his assertion that the Department of Justice declined to seek certiorari, leaving the application in Valder's hands. Obviously, Respondent does not know what elements within the Department may have supported an application, what elements may have opposed, and the reasons for the final decision to hire private counsel to file the application for Valder.

the effort to distinguish them dies there. If the decision below turned on the *Buckley* court's statement that "[a] prosecutor neither is, nor should consider himself to be, an advocate before he has probable cause to have anyone arrested . . ." 509 U.S. at 274, then those cases decided before *Buckley* would obviously be of limited relevance. The court below, however, did not rest its holding on this language from *Buckley*. Rather, it simply announced that "coercion" is not something a prosecutor does; instead, it is a "misuse of an investigative technique" and "therefore relates to a typical police function . . . ." 65 F.3d at 194, Pet. App. 13a. Thus, the appeals court held that a prosecutor engaged in alleged coercion is never entitled to absolute immunity. What the other circuits have held both before and after *Buckley* is that allegations of coercion do not automatically eviscerate absolute immunity and that the court must examine -- as directed by *Buckley* and its predecessors -- what *function* the prosecutor was allegedly performing at the time.

Respondent's belated effort to recast this record to fit the *Buckley* and *Hill* model by now claiming that what Valder was really doing was "*exploring* 'whether the government ha[d] acquired all incriminating evidence' against Moore" (Resp. 8 (emphasis added) (citation omitted)), is telling and is decidedly at odds with his own complaint. Moore claimed that Valder was out to indict him from the outset and used all means at his disposal to fabricate evidence to accomplish that end. It was undoubtedly for that reason that the court of appeals did not engage in a *Buckley*-type analysis of whether the prosecutor believed he had probable cause to indict. The court simply announced -- without regard to the functional context -- that "coercion" and disclosure of grand jury testimony are not activities protected by absolute immunity.[6] It is precisely because the decision

---

[6] Contrary to assertions in Respondent's brief in opposition, the court of appeals issued no decision with respect to Valder's entitlement to qualified immunity. It simply noted in *dicta* that "he of course would be entitled to any qualified immunity available to the postal inspectors." 65 F.3d at 195, n.8; Pet. App. 14a. Thus, "Valder has not challenged